

# **Rule of Law in Iraq: Transitional Justice under Occupation**

**A Monograph  
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In 2003, the United States led a Coalition force into Iraq to depose Saddam Hussein's repressive Ba'ath Party regime. Under the provisions of the Hague Regulation of 1907, the Coalition became an occupying power with all of the attendant rights and responsibilities. To administer Iraq during the occupation, the United States and its allies established the Coalition Provisional Authority. The Coalition's responsibilities included establishing the rule of law to replace Saddam Hussein's rule by decree. The key elements of establishing the rule of law were helping Iraq to reestablish its judicial system and deal with its past. Following the war, Iraq's justice system was a complete shambles. The courts were looted and vandalized and the legal codes were corrupted by decades of Saddam Hussein's decrees. Thousands of former regime officials were subject to criminal charges for participating in the Ba'ath Party's brutal acts. To deal with the complex issues involved in restoring the rule of law, the Coalition Provisional Authority and the Iraqi Governing Council looked to concepts of transitional justice developed during the last part of the twentieth century. This monograph compares the Coalition Provisional Authority's application of transitional justice mechanisms to international experts' recommendations. The majority of current thought on transitional justice derives from transitions in former Communist regimes of Eastern Europe, and South Africa after apartheid. As a study of justice under occupation, the paper focuses on transitional mechanisms appropriate to an occupying power. Military planners need guidelines and effective analysis to plan for restoring rule of law in occupations and peace operations. The Coalition Provisional Authority's errors are significant. The administrative justice process of de-Ba'athification disenfranchised tens of thousands of Iraqis, leading to widespread unemployment and contributing to armed insurgency. The Coalition Provisional Authority failed to establish alternatives to criminal prosecution for Ba'ath Party abuses, placing an unmanageable burden on Iraq's courts. Despite these problems, the Coalition Provisional Authority's overall transitional justice effort met with reasonable success. Within six months after the war, most of Iraq's courtrooms were open and hearing cases. Those who committed the worst abuses under Saddam Hussein no longer serve in Iraq's government or preside in court. The Department of Defense, and the Army in particular, need to capture the lessons of the Iraq occupation and develop planning guidelines for future operations.

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Following the war, Iraq's justice system was a complete shambles. The courts were looted and vandalized and the legal codes were corrupted by decades of Saddam Hussein's decrees. Thousands of former regime officials were subject to criminal charges for participating in the Ba'ath Party's brutal acts. To deal with the complex issues involved in restoring the rule of law, the Coalition Provisional Authority and the Iraqi Governing Council looked to concepts of transitional justice developed during the last part of the twentieth century. This monograph compares the Coalition Provisional Authority's application of transitional justice mechanisms to international experts' recommendations. The majority of current thought on transitional justice derives from transitions in former Communist regimes of Eastern Europe, and South Africa after *apartheid*. As a study of justice under occupation, the paper focuses on transitional mechanisms appropriate to an occupying power.

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# INTRODUCTION

In 2003, a U.S.-led Coalition invaded the sovereign nation of Iraq to remove the Saddam Hussein's Ba'ath Party regime. Saddam Hussein completely dominated Iraqi governmental and public institutions, ruling by decree through the Revolutionary Command Council. As Coalition forces closed in on Baghdad, Saddam Hussein went into hiding rather than face capture. His disappearance created a power vacuum and the Iraqi government disintegrated. When combat transitioned to occupation, Coalition forces faced enormous challenges to restore basic services, provide a safe and secure environment, rebuild the Iraqi economy, and foster a new representative government. In the wake of war, ordinary Iraqi people took to the streets, vandalizing and looting government buildings and property. The damage to Iraq's infrastructure compounded the problems caused by the dissolution of Iraq's government. In the early days of the occupation, a critical mission for the Coalition was the establishment of the rule of law and the restoration of order in Iraq as specified by international law.

## The Rule of Law under Occupation

According to international law as established in the Hague Regulations of 1907, occupation begins when the enemy territory physically falls to the conquering army and is limited to the territory that the army can control.<sup>1</sup> By this definition, the Coalition became an occupying force in Iraq on 13 April 2003.<sup>2</sup> To meet the challenges of post-conflict transition in Iraq, the Bush Administration appointed the Department of Defense lead federal agent. In early 2003, the Department of Defense formed the Office of Reconstruction and Humanitarian Assistance, under

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<sup>1</sup> Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907, Article 42. See Appendix A for full text.

<sup>2</sup> Center for Security Policy. "*Operation IRAQI FREEDOM – A Timeline of Events.*" 22 April 2003. <<http://www.centerforsecuritypolicy.org/operationiraqifreedomtimeline.pdf>> (18 December 2003), 19.

the leadership of retired Lieutenant General Jay Garner, to develop the post-conflict plan.<sup>3</sup>

The Under Secretary of Defense for Policy, Douglas J. Feith, wrote, “The immediate responsibility for administering post-war Iraq will fall upon the Commander of the U.S. Central Command, as the commander of the U.S. and coalition forces in the field. The purpose of the Office of Reconstruction and Humanitarian Assistance is to develop detailed plans.”<sup>4</sup> The initial post-conflict planning focused heavily on dealing with potential humanitarian needs such as refugees, disease, and food shortages. When these conditions failed to materialize after the war, the Office of Reconstruction and Humanitarian Assistance moved to Iraq and began the work of rebuilding Iraq’s government, institutions, infrastructure, and economy.

In May 2003, President Bush appointed former Ambassador L. Paul Bremer III Administrator of the Coalition Provisional Authority. Formed around the Office of Reconstruction and Humanitarian Assistance, the Coalition Provisional Authority was a multinational, interagency organization. This organization had broad responsibilities to control nearly every aspect of Iraqi government, society, and economy. Foremost among the Coalition Provisional Authority’s responsibilities was the requirement to restore and maintain public order, safety, and security. Restoring the rule of law was essential to meeting the Coalition’s obligations to the United Nations and Iraq. It was also necessary for achieving the Coalition’s long-term objectives of transforming Iraq into a democratic nation with a free market economy.

The key elements of establishing the rule of law were helping Iraq to reestablish its judicial system and dealing with the Ba’ath Regime’s repressive legacy. These requirements derived from international law, a growing body of thought on “transitional justice,” and experiences in recent peacekeeping operations. Under the rule of law, all members of society,

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<sup>3</sup> U.S. Department of State, International Information Programs, “U.S., U.N. Prepare to Meet Humanitarian Needs in Iraq,” (14 February 2003) <<http://usinfo.state.gov/regional/nea/iraq/text2003/0214prepare.htm>> (14 March 2004).

<sup>4</sup> U.S. Department of Defense, “A Commitment to Post-War Iraq: Basic Principles” (12 March 2003) <<http://www.defendamerica.mil/iraq/irq031203.html>> (2 February 2004).



including the ruler, are subject to the laws of the land. Rooted in ideals of individual freedom, the rule of law is a central theme of Western constitutional government. The rule of law protects “individuals from despotic measures of their own sovereign.”<sup>5</sup> Where the rule of law exists, judicial systems are independent from executive or legislative control. Judges decide cases based on legal precedent and existing codes, not subject to political interference.<sup>6</sup>

To establish credibility, a justice system must demonstrate a clear break with the past repressive regime and lay the foundation for the future. However, to discard completely the old forms and codes would result in chaos. The rule of law is the touchstone of societies during a time of significant political and social upheaval. The Iraqi justice system had to change. However, it also needed to retain its Iraqi identity or it would lose credibility with the Iraqi people. In a United States Institute for Peace Special Report, Robert Perito asserted that establishing the rule of law should be the single most important objective of the Coalition in the post-war period.<sup>7</sup>

Perito recommended creating a robust “civilian U.S. Stability Force” consisting of police, judicial, and prison administration teams. The force would act to restore public order quickly and operate the Iraqi justice system from “investigation to incarceration” until the new Iraqi government could manage its own internal security.<sup>8</sup> Perito developed this construct from his analysis of experience gained from previous peace operations, specifically in Kosovo. He first proposed a stability force in a *Parameters* article co-authored by Major Kimberly C. Field, a

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<sup>5</sup> Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918-1923*, (New York: Oxford University Press, 1944), x.

<sup>6</sup> Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 11-12.

<sup>7</sup> Robert M. Perito, “Special Report 104: Establishing the Rule of Law in Iraq,” United States Institute of Peace (April 2003) <<http://www.usip.org/pubs/specialreports/sr104.pdf>> (29 September 2003, 1.

<sup>8</sup> Ibid, 12.

Military Police officer.<sup>9</sup> Perito, in recommending the same approach for Iraq, attempted to apply a generic framework that did not fit the conditions in Iraq. Without questioning the implicit value of a deployable civilian justice capability, planners must assess each situation on its own merits. The practical considerations of recruiting a large number of legal personnel with suitable language skills and a willingness to operate the entire Iraqi judicial system made Perito's approach unattainable.

In January 2003, the Center for Strategic and International Studies also proposed creating a deployable justice capability. The capability envisioned closely resembled Perito's design for a U.S. stability force but differed in composition. Rather than relying on U.S. assets only, it depended on recruiting a team of international experts. That team would deploy to Iraq under the authority of the United Nations, work with existing Iraqi capabilities, and perform judicial functions if necessary.<sup>10</sup> Although this approach was more practical, the overall security situation prevented its implementation.

The Coalition Provisional Authority did not have sufficient personnel to inject U.S. or international civilians into every level of the Iraqi judicial system to assume the direct operation of the Iraqi justice system. Since a truck bomb destroyed its Baghdad headquarters in August 2003, the security situation also prevented the U.N. from maintaining a robust presence in Iraq. Absent a U.S. or international force of justice system administrators, the only remaining practical means to restore rule of law was to employ indigenous Iraqi capabilities. The Coalition worked with the interim Iraqi Governing Council and the Iraqi judiciary to establish the rule of law by shutting down Saddam Hussein's Special Courts, restoring the Ministry of Justice infrastructure, assuring judicial independence, and eliminating Saddam's unjust laws.

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<sup>9</sup> Kimberly C. Field and Robert M. Perito, "Creating a Force for Peace Operations: Ensuring Stability with Justice," *Parameters* (Winter 2002-03), 80.

<sup>10</sup> Frederick D. Barton, Bathsheba N. Crocker, et al., "A Wiser Peace: An Action Strategy for a Post-Conflict Iraq" (January 2003) <<http://www.csis.org/features/wiserpeace.pdf>> (23 September 2003).

## Transitional Justice

A number of studies published before and during the war recommended comprehensive programs to help Iraq deal with its abusive past and to build a new, democratic society. These studies and assessments drew heavily from emerging ideas of transitional justice developed during the last decades of the twentieth century. Transitional justice refers to legal and administrative mechanisms nations employ when making the transition from authoritarian to democratic rule.

Ruti G. Teitel, the Ernst C. Stiefel Professor of Comparative Law at New York University Law School, groups transitional justice into five broad categories: criminal, historical, reparatory, administrative, and constitutional.<sup>11</sup> The International Center for Transitional Justice identifies the five key elements of transitional justice as “prosecuting perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation.”<sup>12</sup> These transitional processes explain the common elements of justice in times of transition. However, they do not prescribe the appropriate approach to any given transitional environment.

The importance of transitional justice is its inherent capability to shape the new political order. It is highly correlated with the political realities of transition and its practice has broad implications for the future political life of the nation. Recognition of the nature of transitional justice informs decision making throughout the transitional period, enabling planners to design the transitional justice process to achieve the desired outcome. Transitional justice is simultaneously shaped by the past and shaping the future.<sup>13</sup>

In 2002, the State Department assembled the Working Group on Transitional Justice in

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<sup>11</sup> Teitel, *Transitional Justice*, 3-9.

<sup>12</sup> International Center for Transitional Justice (2004) <<http://www.ictj.org/aboutus.asp>> (31 March 2004).

<sup>13</sup> Teitel, *Transitional Justice*, 6.

Iraq to examine transitional justice planning and to work out the details of a post-conflict legal environment for Iraq. The working group consisted of members of the Iraqi Jurists Association, international experts, and Iraqi-American legal professionals. Taking the lead in developing a comprehensive plan, the working group planned a broad range of activities: judicial reforms institutional reform, education, and transitional justice.<sup>14</sup>

## Planning

The recommendations of the United States Institute of Peace and the Center for Strategic and International Studies published before and during the occupation of Iraq, assumed that the indigenous capability was insufficient to meet transitional justice requirements. They recommended that the U.S. prepare to administer Iraq's justice system directly. In April 2003, Robert M. Perito recommended that the Coalition deploy judicial teams to "help ensure accountability for human rights violations, provide guidance on dealing with accused war criminals, and advise and assist with the rehabilitation and reform of the justice system."<sup>15</sup> He called for a deployment of a "U.S. Stability Force" of about 250 legal professionals to support Iraqi transitional justice.<sup>16</sup> A Center for Strategic and International Studies report by Michele Flournoy and Michael Pan envisioned a similar capability with "interim legal codes" to handle justice in contingency operations.<sup>17</sup>

In these proposed scenarios, the Iraqi judiciary was responsible for handling everyday

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<sup>14</sup> U.S. Department of State, "Working Group on 'Transitional Justice in Iraq' Meets in Washington" 12 July 2002 <<http://usinfo.state.gov/regional/nea/Iraq/text/0712group.htm>> (28 January 2004).

<sup>15</sup> Robert M. Perito, "Special Report 104: Establishing the Rule of Law in Iraq," United States Institute of Peace (April 2003) <<http://www.usip.org/pubs/specialreports/sr104.pdf>> (29 September 2003), 15.

<sup>16</sup> Ibid., 14.

<sup>17</sup> Michele Flournoy and Michael Pan, "Dealing with Demons: Justice and Reconciliation" *The Washington Quarterly* 25:4 (Autumn 2002) The Center for Strategic and International Studies and the Massachusetts Institute of Technology, 121-2.

cases in the lower courts. Foreign judges were to oversee the higher functions of the judicial system. While these schemes focused on U.S. and international jurists filling in for the Iraqi justice system during the transitional period, other studies recommended that the Iraqi judicial system take the lead in executing transitional justice measures. In May 2003, the Working Group on Transitional Justice in Iraq presented its plan to the United Nations in New York and to a group of 100 Iraqi jurists in Baghdad. Their plan outlined the steps to rehabilitate the Iraqi justice system and gave Iraqi judges responsibilities for prosecuting former abuses, establishing truth committees, and overseeing reparations.<sup>18</sup> The Coalition could assist and support the transitional justice efforts, but would limit its implementation efforts to the most critical aspects of the Iraqi judicial system.

In the view of Iraqis involved in pre-war planning, the Iraqi judicial system could handle nearly all of the transitional justice requirements on its own. The working group's plan had the advantage that it used far less U.S. manpower and resources and it increased the credibility of the Iraqi judicial system. The risk was that the Iraqi judiciary, largely an unknown quantity, might fail. Such a failure would tarnish the Coalition's credibility and jeopardize mission success. The challenge for Coalition planners was to determine the appropriate balance of Iraqi and international involvement in providing transitional justice in Iraq.

## **Implementation**

The planners in the Office of Reconstruction and Humanitarian Assistance and the Coalition Provisional Authority had competing viewpoints and demands to consider in planning for the Iraqi justice system. These planners recognized that the postwar environment in Iraq would be complex and dangerous. The challenge for the planners in the Coalition Provisional

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<sup>18</sup> U.S. Department of State, "Working Group on 'Transitional Justice in Iraq' Meets in Washington" 12 July 2002 <<http://usinfo.state.gov/regional/nea/Iraq/text/0712group.htm>> (28 January 2004).

Authority was to develop the appropriate framework for implementing transitional justice measures and shaping the future Iraqi justice system.

The most pressing requirement was to get the courts open quickly in order to handle the cases arising from criminal activity in the wake of the regime's collapse. The Coalition Provisional Authority needed to eliminate Ba'ath Party members and influences from the courts, the laws, and the judiciary to restore the credibility of the justice system. The Coalition Provisional Authority also had to devise a way to prosecute Saddam Hussein and former regime officials for their crimes against the Iraqi people.

Although not without problems, the Coalition Provisional Authority's handling of transitional justice in Iraq was generally successful in meeting short-term objectives. Less than a year after the end of major ground conflict in Iraq, the courts are open, staffed with qualified judges and lawyers, and hearing cases. Supported by Coalition Provisional Authority legal experts, the court system is improving constantly. Saddam Hussein and many of the senior Ba'ath regime officials are in custody and awaiting prosecution by a newly formed Tribunal that will try cases in Iraq with Iraqi judges. These successes will influence the development of the new Iraqi government, society, and economy. For the first time in its turbulent history, the nation of Iraq has a real opportunity to develop an open and democratic society based on the rule of law. The Iraqi Governing Council signed an interim constitution on 8 March 2004, and the stage is set for the first truly democratic elections in the history of the nation.

However, some of the Coalition's transitional justice policies have not supported long-term stability for Iraq. The Coalition Provisional Authority adopted an imbalanced approach to transitional justice. This approach put great emphasis on exposing, purging, and punishing members of Saddam Hussein's regime. Less punitive measures, such as truth commissions, failed to materialize. The Coalition Provisional Authority's punitive approach led to overzealous application of de-Ba'athification measures that created a large disenfranchised, unemployed

group of people. As a source of potential future conflict, this group represents the greatest threat to the Coalition's long-term strategic objectives in Iraq.

## **PURGING SADDAM HUSSEIN'S REGIME**

The stated objective of the invasion of Iraq was the removal of Saddam Hussein's regime. However, removing Saddam Hussein was only the first step. Saddam Hussein relied on the Ba'ath Party hierarchy to maintain his hold on power and to administer the country. The Ba'ath Party exercised its power through a broad range of activities. Membership in the Ba'ath Party was frequently a prerequisite for education, employment, and promotion opportunities. Ba'ath penetration of Iraqi society ensured that the Party could exert control over nearly every aspect of public life. The Ba'ath Party used fear to control those aspects of society it did not penetrate. Special security organizations tortured and killed thousands of Iraqis under orders from Saddam Hussein and the Party's senior leaders. Additionally, Saddam and the Party leadership had no qualms about using violence against Party members to keep them in line. Indeed, Party members who stepped out of line often incurred the harshest punishments. The Ba'ath Party in Iraq carried out Saddam's repressive policies. The initial planning for the transition, therefore, included purging the Ba'ath Party from Iraqi society as well as removing Saddam Hussein from power.

Purging and vetting are common administrative justice practices in transition. Most often associated with the de-Nazification of Germany following the Second World War, administrative justice is primarily a political process.<sup>19</sup> It involves changing the political and bureaucratic nature of the state by eradicating the former regime's power structure and its practitioners.

Administrative justice is the political exclusion of a group based solely on past political association rather than on any specific involvement in the abuses of the past regime. Because

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<sup>19</sup> Teitel, *Transitional Justice*, 159-160.

these administrative justice measures are not an outcome of a trial in a court of law, they create a dilemma for a new democracy. Teitel describes the administrative justice dilemma as one of ends and means. Some assert that the end, democratization, justifies employing arbitrary means in the short term. Others counter that the means of dealing with past abuses will define the new order, for better or worse.<sup>20</sup>

The reality is that societies in transition routinely employ decidedly undemocratic methods to deal with the past regime and clear the way for democratic reforms. Disenfranchisement is an unavoidable consequence of administrative justice measures when they are widely applied. Certainly, there are people from the overthrown regime who unrepentantly cling to the authoritarian ideal, but they are likely to exclude themselves voluntarily from participation, preferring to work from outside the democratic process to further its demise. Administrative justice measures adversely affect primarily those members of the former regime who are most likely to accept, if not embrace, the new political reality and serve effectively in the new political order.

Paul van Zyl of the International Center for Transitional Justice argued against implementing a “blanket prohibition” on Ba’ath Party members. Instead, he recommended an individualized approach to vetting Ba’ath Party members based on the following principles:

1. Persons should be removed or barred from public office based on an individual assessment of their responsibility for serious misconduct (which would in normal circumstances lead to dismissal) or human rights abuse.
2. Persons should *not* be removed or barred from office *solely* on the basis of party affiliation or ideology.
3. Persons under investigation should be made aware of the allegations against them and given an opportunity to reply before a decision is made regarding their employment.
4. Persons should be afforded the right to appeal a decision.
5. A vetting body must be impartial and independent from political control.

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<sup>20</sup> Ibid., 149-150.



6. If exceptions to any vetting policy are made, they should not apply to persons found to be responsible for human rights abuse.<sup>21</sup>

This moderate approach to purging Ba'ath Party members from government derives from the lessons of "de-Nazification" in Germany after World War II. The de-Nazification effort caused massive problems for the occupation authorities. General Lucius Clay, the U.S. military governor, considered de-Nazification a failure that alienated the people.<sup>22</sup> The original intent of de-Nazification was to exclude former Nazis from all of the public sector. Theoretically, every government official who was a member of the Nazi Party was subject to removal from office and banned from public service in the new democracy. The reality of such a sweeping purge is that the government would soon have found itself unable to function because of the loss of so many qualified and experienced officials.

## **De-Ba'athification**

On 11 May 2003, General Tommy Franks, Commanding General of U.S. Central Command, ordered the Ba'ath Party dissolved.<sup>23</sup> Broadcast in Arabic throughout Iraq, his announcement was the first step in a long, arduous process of eliminating Saddam Hussein's influence in Iraqi affairs. Ambassador Bremer reaffirmed and clarified the de-Ba'athification policy on 16 May 2003 in the first official Coalition Provisional Authority Order. The Coalition Provisional Authority Order directed the removal of Ba'ath Party members in the top four levels

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<sup>21</sup> Paul van Zyl, "Transitional Justice in Iraq: An ICTJ Policy Paper" (May 2003) <<http://www.ictj.org/downloads/Iraq%20Transitional%20Justice%20Policy%20Paper.pdf>> (28 March 2003), 8.

<sup>22</sup> Douglas Porch, "Germany, Japan, and the 'De-Baathification' of Iraq," *Strategic Insights* II:3 (March 2003) Center for Strategic Conflict <<http://www.ccc.nps.navy.mil/si/mar03/middleEast3.pdf>> (28 March 2004).

<sup>23</sup> Cable News Network, "Franks: Baath Party Dissolved" (11 May 2003) <<http://www.cnn.com/TRANSCRIPTS/0305/11/sm.17.html>> (23 September 2003).

of the Party hierarchy and of senior bureaucrats with any Ba'ath Party affiliation.<sup>24</sup> By most estimates, the de-Ba'athification order affected nearly 30,000 Iraqis, not counting the hundreds of thousands of newly unemployed soldiers. In June 2003, the Coalition Provisional Authority directed military commanders in the Coalition Forces to implement the de-Ba'athification order throughout Iraq. These local commanders established Accreditation Review Committees to investigate public officials for Ba'athist ties and make recommendations for removing Ba'ath Party members. At the national level, the Coalition Provisional Authority established the Iraqi De-Ba'athification Council to advise the Administrator on de-Ba'athification matters.<sup>25</sup>

The de-Ba'athification policy was unique in that it provided for exceptions and appeals. The Coalition Provisional Authority recognized that not all Ba'ath Party members were complicit in regime abuses. Many joined the Ba'ath Party as a precondition for employment. The Coalition Provisional Authority designed the policy so that nominal members who did not participate in the regime's abuses could obtain exceptions to de-Ba'athification.<sup>26</sup> Purging the Ba'ath Party's influence from Iraq's government and society was necessary. Iraq's transformation from authoritarian rule to a democratic society depended on the eradication of Ba'ath ideology. However, the implementation of the policy was inconsistent.

In November 2003, Ambassador Bremer delegated the authority to administer de-Ba'athification to the Iraqi Governing Council.<sup>27</sup> Political factions unduly hampered the appeals

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<sup>24</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 1: De-Baathification of Iraqi Society" (16 May 2003) <<http://www.cpa-iraq.org/regulations/CPAORD1.pdf>> (29 September 2003).

<sup>25</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 5: Establishment of the Iraqi De-Baathification Council" (25 May 2003) <<http://www.cpa-iraq.org/regulations/CPAORD5.pdf>> (23 September 2003).

<sup>26</sup> Coalition Provisional Authority, "Coalition Memorandum Number 1: Implementation of De-Baathification Order No. 1" (3 June 2003) <<http://www.cpa-iraq.org/regulations/M01.pdf>> (23 September 2003).

<sup>27</sup> Coalition Provisional Authority, "Coalition Provisional Memorandum Number 7: Delegation of Authority Under De-Baathification Order Number 1" (4 November 2003) <[http://www.cpa-iraq.org/regulations/20031110\\_CPAMEMO7.pdf](http://www.cpa-iraq.org/regulations/20031110_CPAMEMO7.pdf)> (27 January 2004).

process and delayed rehiring thousands of people with approved appeals. In April 2004, the Coalition Provisional Authority acknowledged that it had applied the de-Ba'athification policy unfairly, particularly to educators.<sup>28</sup> The policy of de-Ba'athification violated democratic principles of individual freedom, and instead established a standard of collective guilt. Ba'ath Party members of convenience who joined the party for employment and education received the same treatment as those who brutalized their own countrymen at Saddam Hussein's behest. In future occupations, defense planners must seek pragmatic solutions.

The Coalition Provisional Authority could have avoided such perceptions, as well as the counterproductive outcomes of de-Ba'athification, by applying more widely the vetting process employed by the Ministry of Justice. Within the Ministry of Justice itself, de-Ba'athification took a different course. Rather than starting with a blanket application of the policy to Ba'ath Party members, the Coalition and Ministry of Justice undertook a review of all judges and prosecutors. This vetting process more closely followed the principle of "innocent until proven guilty" in evaluating the complicity of the accused, and ensured that the Ministry of Justice retained enough qualified people to function effectively in the future.

## **Vetting the Judiciary**

Over the years of Saddam Hussein's rule, the Ba'ath party compromised severely the independence and impartiality of the judiciary. The Working Group on Transitional Justice in Iraq proposed forming a Judicial Council to oversee the vetting of Iraqi judges. This proposed Council would consist initially of nine judges whose alienation from the former regime is a known quantity, "judges forcibly retired in Iraq, those in exile, and others presently in the

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<sup>28</sup> Coalition Provisional Authority, Press Conference (23 April 2004) <[http://www.cpa-iraq.org/transcripts/20040423\\_Apr23\\_KimmittSenor.html](http://www.cpa-iraq.org/transcripts/20040423_Apr23_KimmittSenor.html)> (30 April 2004).

Kurdish region.”<sup>29</sup> Composed of members of integrity, the Council would provide the impetus for reform and form the core of the justice system. The Council was to “appoint investigative judges to investigate alleged crimes of (sic) officials of Saddam’s regime under the Iraqi penal code.”<sup>30</sup>

In June 2003, the Coalition Provisional Authority published Coalition Provisional Authority Order 15, creating a Judicial Review Committee. The committee consists of three Iraqi members and three international members. The Coalition Provisional Authority did not require committee members to be judges, only lawyers. The Coalition Provisional Authority Administrator, L. Paul Bremer, appointed the committee members directly. Judge Donald F. Campbell, Coalition Provisional Authority Senior Adviser to the Ministry of Justice, supervised the committee’s work.<sup>31</sup>

The Judicial Review Committee reviewed over 850 Iraqi judges and prosecutors for Ba’ath Party affiliation and corruption. The review process drew on testimony from within the legal profession, ordinary citizens, and Coalition commanders. In November 2003, the Iraqi Minister of Justice Hashem al-Shibli announced the firing of 100 judges for “making legal errors during their service under the former regime.”<sup>32</sup> The Ministry of Justice vetting process used by the Judicial Review Committee relied on evidence of individual complicity with Ba’ath Party abuses, rather than applying a uniform assumption of guilt by association.

## Summary

As a means of displacing the Ba’ath Party, the Ministry of Justice approach was far more

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<sup>29</sup> Working Group on Transitional Justice in Iraq, and Iraqi Jurists’ Association, “Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society. A Blueprint” n.p. (March 2003), 9-10.

<sup>30</sup> Ibid.

<sup>31</sup> Coalition Provisional Authority, “Coalition Provisional Authority Order Number 15: Establishment of the Judicial Review Committee.” 23 June 2003, <<http://www.cpa-iraq.org/regulations/CPAORD15.pdf>> (27 January 2004).

<sup>32</sup> Iraq Press, “100 Judges Sacked” (21 November 2003) <<http://www.iraqpress.org/english.asp?fname=ipenglish%5C2003-11-21%5C1.htm>> (28 March 2004).

effective than the all-inclusive de-Ba'athification measures applied in other government agencies. The Ministry of Justice approach to de-Ba'athification ensured that the majority of Iraq's judiciary continued to function, while removing those individuals who demonstrated disregard for their profession. In fact, many judges and prosecutors who were members of the Ba'ath Party continued to perform their duties while the Judicial Review Committee conducted its investigations. Combined with legal and institutional reforms, the success of this approach is evident in the fact that the Ministry of Justice was able to resume full operations within six months after the war.

## **RESTORING IRAQ'S JUSTICE SYSTEM**

Despite the effectiveness of the Coalition Provisional Authority's application of administrative justice measures, purging and vetting only solved the Iraqi justice system's personnel problem. The Coalition Provisional Authority could afford to take a measured approach to vetting judges and prosecutors. It had to act more quickly to provide the facilities, organizations, and procedures compatible with the Coalition's strategic objectives. In the early days of the occupation, Coalition Provisional Authority planners focused on restoring and reforming basic justice operations. To meet immediate needs, planners identified three priorities: infrastructure, emergency legal reforms, and institutional reforms.

In May 2003, after the Coalition forces drove Saddam Hussein and the Ba'ath Party apparatus from power, the U.S. Department of Justice sent 25 advisors to assist the Coalition Provisional Authority in reestablishing the rule of law in Iraq. The advisory group included a 13-member judicial assessment team of judges, prosecutors, public defenders, and court administrators from the Department of Justice's Office of Overseas Prosecutorial Development. The judicial assessment team brought a wide range of experience, including operations in Kosovo

and Bosnia-Herzegovina.<sup>33</sup>

## Restoring Infrastructure

According to the initial study conducted by the Coalition Provisional Authority judicial assessment team, looting and vandalism in the aftermath of the war rendered nearly all of the courts unusable in the short term.<sup>34</sup> Judge Donald F. Campbell of the Coalition Provisional Authority was the Senior Adviser to the Ministry of Justice from June to October 2003. A Major General in the United States Army Reserve, he brought a wealth of experience to the justice effort, including service in Haiti. Judge Campbell noted during a National Public Radio program in November 2003, shortly after his return from Baghdad, “It was easy to see in the beginning what needed to be done. The courts couldn’t function because they didn’t have any facilities.”<sup>35</sup> The extent of damage essentially meant that Coalition forces had to refurbish or rebuild every courtroom in the country in order to resume basic judicial processes.

Under the rules of occupation in the Hague Regulation, the occupying force has the authority to use Iraqi public property to maintain its occupation.<sup>36</sup> The caveat is that the Coalition must safeguard the property for eventual return to Iraqi control when the occupation ends. It may use the financial proceeds from the occupation only for the administration of the country and for its benefit.<sup>37</sup> This provision enabled the Coalition Provisional Authority to take control of all

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<sup>33</sup> U.S. Department of Justice, “Department of Justice Sends 25 Advisors to Iraq in Support of Provisional Authority Effort to Reconstruct Criminal System” (20 May 2003) <[www.usdoj.gov/opa/pr/2003/May/03\\_ag\\_267.htm](http://www.usdoj.gov/opa/pr/2003/May/03_ag_267.htm)> (13 March 2003).

<sup>34</sup> Jim Edwards, “From the Ground Up,” *New Jersey Law Journal* 74, no. 3 (20 October 2003) <<http://www.dejlaw.com/Publications/Articles/ORLOFSKY10.20.03.pdf>> (13 March 2004).

<sup>35</sup> WBUR and National Public Radio. “Balancing Scales in Iraq.” Audio recording. The Connection. 12 November 2003. <[http://www.theconnection.org/shows/2003/11/20031112\\_a\\_main.asp](http://www.theconnection.org/shows/2003/11/20031112_a_main.asp)> (20 March 2004).

<sup>36</sup> Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 190, Article 55. See Appendix A for full text.

<sup>37</sup> *Ibid.*, Article 56.

Ministry of Justice facilities and to administer the infrastructure.

On 31 May 2003, the Coalition Provisional Authority directed all Ministry employees to return to work and to begin repairing, cleaning, and restoring courthouses and other Ministry buildings.<sup>38</sup> In some areas, Coalition forces and Ministry of Justice employees Ministry found courtrooms beyond repair, and had to find alternate facilities. In other places, such as Baghdad, the damage and security situation forced commanders to consolidate justice operations into fewer sites.

In June 2003, Ambassador Bremer formally established a facilities management program to gain control of public property and put it to effective use. The Coalition Provisional Authority Facility Manager had the responsibility under Coalition Provisional Authority Order No. 9 to document all Iraqi public property used by the Coalition Provisional Authority and the emerging Iraqi administration.<sup>39</sup> These actions formally consolidated the Coalition's control and management of all justice system facilities in Iraq. Coalition and Ministry of Justice efforts succeeded in restoring the capacity of the courts to pre-war levels, and by November 2003, nearly all of Iraq's courtrooms were open and functioning.<sup>40</sup>

## **Legal Reform**

In addition to tampering with the court system, Saddam Hussein manipulated the laws of Iraq to consolidate his control over the country. According to the Working Group on Transitional Justice in Iraq, these laws constituted major violations of basic human rights and international

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<sup>38</sup> Coalition Provisional Authority, Senior Adviser to the Ministry of Justice, Untitled Memorandum, 31 May 2003, n.p., n.d.

<sup>39</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 9: Management and Use of Iraqi Public Property," (23 June 2003) <<http://www.cpa-iraq.org/regulations/CPAORD15.pdf>> (29 September 2003).

<sup>40</sup> WBUR and National Public Radio. "Balancing Scales in Iraq." Audio recording. The Connection. 12 November 2003. <[http://www.theconnection.org/shows/2003/11/20031112\\_a\\_main.asp](http://www.theconnection.org/shows/2003/11/20031112_a_main.asp)> (20 March 2004).

norms.<sup>41</sup> The criminal code applied the death penalty to a broad range of offenses related to internal security and political dissension. The military penal code provided “immunity for crimes committed against civilians” but imposed severe punishments for “offences related to security of the regime and its military institutions.”<sup>42</sup>

The Hague Regulations require the occupying power to use all available means to establish public order and security. However, it may not arbitrarily impose its own rules and laws, but must respect the laws of the land “unless absolutely prevented.”<sup>43</sup> Therefore, the Coalition Provisional Authority could not impose a constitution or body of law on Iraq during the occupation. However, it could and did repeal laws that might have prevented restoration of order, safety, and security.

The Working Group on Transitional Justice held that the laws of Iraq before Saddam Hussein were sufficient to see Iraq through the transition period, and that permanent changes would have to wait for the election of a permanent legislature.<sup>44</sup> However, the Working Group identified laws that violated human rights, and provided Coalition authorities with a recommended list of laws to repeal immediately.

On 9 June 2003, the Coalition Provisional Authority adopted the Iraqi Penal Code of 1969 with interim modifications as the applicable criminal law under occupation. The Coalition Provisional Authority’s order suspended provisions inconsistent with international law and democratic norms. The following provisions related to the internal security of the Ba’ath Party, and carried the death penalty under Saddam’s rule:

Any person who is a member of the Arab Socialist Ba’ath Party and who willfully conceals any previous party or political membership or affiliation.

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<sup>41</sup> Working Group on Transitional Justice in Iraq, 16.

<sup>42</sup> Ibid., 17.

<sup>43</sup> Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 190, Article 43. See Appendix A for full text.

<sup>44</sup> Working Group on Transitional Justice in Iraq, 16.



Any person who is or has been a member of the Arab-Socialist Ba'ath Party and who is found to have links during his commitment to the Party with any other political or party organization or to be working for such organization or on its behalf.

Any person who is or has been a member of the Arab Socialist Ba'ath Party and who is found to be, following the termination of his relationship with the Party, a member of any other political or party organization or to be working for such organization or on its behalf.

Any person who recruits to a political or party organization another person who is affiliated to the Arab Socialist Ba'ath Party or recruits such person in any way to that organization following the termination of his affiliation with the Party while being aware of that affiliation.<sup>45</sup>

The Coalition Provisional Authority's intent in eliminating these provisions was to promote political freedoms and further the de-Ba'athification of Iraqi society. The de-Ba'athification process normally brings to mind the personnel measures discussed in Chapter 3. However, the purpose of the original de-Ba'athification order given by General Franks, later confirmed by Ambassador Bremer, was to eradicate the symbols, institutions, and ideologies of the Ba'ath Party.<sup>46</sup>

Eradication of Ba'ath Party influence extended naturally to the laws of Iraq. However, the Coalition Provisional Authority went beyond this negative aim of removing unwanted provisions. In the order that modified the penal code, the Coalition Provisional Authority included the precursor of the Iraqi bill of rights that would later appear in the interim constitution:

In exercising their official functions, all persons undertaking public duties or holding public office, including all police, prosecutors, and judges, must apply the law impartially. No person will be discriminated against on the basis of sex, race, color, language, religion, political opinion, national, ethnic or social origin, or birth.<sup>47</sup>

Additionally, the Coalition's long-term goal of a free and democratic Iraq prompted

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<sup>45</sup> Iraqi Penal Code of 1969 <<http://www.casi.org.uk/info/cpa/penalcode.doc>> (23 February 2004).

<sup>46</sup> Cable News Network, "Franks: Baath Party Dissolved" (11 May 2003) <<http://www.cnn.com/TRANSCRIPTS/030511/sm.17.html>> (23 September 2003).

<sup>47</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 7: Penal Code" (23 May 2003) <<http://www.cpa-iraq.org/regulations/CPAORD7.pdf>> (29 September 2003), 2.

Ambassador Bremer to restrict the application of existing Iraqi laws that judges could use to infringe upon individual rights. Ambassador Bremer reserved the right to allow prosecutions under the following provisions of the 1969 Iraqi Penal Code:

Part One, Chapter Four, Paragraphs 81-84, publication offenses.

Part Two, Chapter One, Paragraphs 156-189, offenses against the internal security of the state.

Part Two, Chapter Two, Paragraphs 190-195; 198-199; 201-219, offenses against the internal security of the state.

Part Two, Chapter Three, Section One, Paragraphs 223-224; 226-228, offenses against public authorities.

Part Two, Chapter Three, Section Two, Paragraph 229, offense of insulting a public official.<sup>48</sup>

These provisions define political crimes under Iraqi law and the Ba'ath Party under Saddam Hussein used the law to justify human rights violations. During the Coalition Provisional Authority's tenure, prosecution of these offenses could not occur without Ambassador Bremer's permission.

The Coalition Provisional Authority introduced further legal reforms on 10 September 2003, with modifications to the maximum penalties for several categories of criminal activity including kidnapping, rape, and sabotage.<sup>49</sup> Such crimes increased dramatically after the war as police presence diminished, criminal gangs proliferated, and insurgents resorted to terrorizing Iraqi civilians. Criminal gangs kidnapped children to extort money from middle to upper class Iraqi families.<sup>50</sup> Car theft also became a growth industry as insurgents sought vehicles to employ in explosive attacks on Coalition and Iraqi security forces. The growing insurgency fomented by former regime loyalists, coupled with increasing crime rates, made these tougher sentencing

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<sup>48</sup> Ibid.

<sup>49</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 31: Modifications of Penal Code and Criminal Proceedings Law" (10 September 2003) <[http://www.cp-iraq.org/regulations/20030921\\_CPAORD31.pdf](http://www.cp-iraq.org/regulations/20030921_CPAORD31.pdf)> (29 September 2003).

<sup>50</sup> Peter Beaumont, "Kidnappers Target Youth of Baghdad" (29 February 2004) <<http://observer.guardian.co.uk/international/story/0,6903,1158675,00.html>> (10 March 2004).

guidelines necessary.

The Coalition Provisional Authority's initial modifications of Iraqi legal codes eliminated Saddam Hussein's unjust provisions that consistently allowed the regime to violate human rights through Iraqi courts. Iraq's courts now operated in the open, as the Coalition Provisional Authority moved to eliminate Saddam Hussein's network of special courts that carried out his repressive policies. Although diminished security remained a concern for the Iraqi people, they no longer needed to fear for their lives from their justice system.

## **Institutional Reform**

Prior to the liberation of Iraq, the Ministry of Justice did not function as an independent branch of government. Rather, Saddam Hussein controlled the Ministry of Justice directly. Ambassador L. Paul Bremer III, Administrator of the Coalition Provisional Authority, noted, "The Iraqi justice system has been subjected to political interference and corruption over the years of Iraqi Ba'ath Party rule."<sup>51</sup> According to Dr. Tariq Ali Al-Saleh of the Iraqi Jurists Association, the subordination of the justice system began with the enactment of "The Reform of the Legal System Act" in 1977.<sup>52</sup> In part, the Act provided that "The political leadership...is in charge of appointing legislative, administrative, and judicial apparatuses (sic) and in the way that satisfies the requirement of achieving the aims of the political leadership in executing its choices."<sup>53</sup>

Through the Revolutionary Command Council, Saddam Hussein established a number of Revolutionary, Special, and National Security Courts under various government agencies, to

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<sup>51</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 15: Establishment of the Judicial Review Committee," (23 June 2003) <<http://www.cpa-iraq.org/regulations/CPAORD15.pdf>> (29 September 2003).

<sup>52</sup> Tariq Ali Al-Saleh, "The Supremacy of Law and Justice," *The Jurist* 5 (19 September 2001) <<http://www.ija2.co.uk/html/fe.html>> (11 January 2004), 11.

<sup>53</sup> *Ibid.*, 13.

include the Ba'ath party itself. These courts exercised jurisdiction over political, security, and other cases. These cases had no basis in criminal, civil, or constitutional law. Instead, they existed to punish Iraqis for offenses defined by Saddam Hussein and the Ba'ath Party, and were the main “legal” instrument of the regime’s oppressive policies. As a result, the Iraqi people viewed all of the courts with fear and distrust.

In early 2003, the Office of Reconstruction and Humanitarian Assistance and the Coalition Provisional Authority examined the option of employing international judges and prosecutors in Iraq’s courts as in the Balkans. The decision to employ international judges and prosecutors depended on whether an international police force deployed to Iraq or the Iraqi courts system proved unable to handle criminal prosecutions under international law.<sup>54</sup> Ultimately, the Coalition Provisional Authority determined that the Iraqi courts could manage the criminal prosecutions, and international police forces have not deployed to Iraq. Consequently, international personnel currently in Iraq serve in advisory capacities to the Iraqi Ministry of Justice and the courts.

Coalition efforts to restore the independence, credibility, and appropriate jurisdiction of the judiciary were essential for a successful transition. The Working Group on Transitional Justice recommended abolishing all special courts and the revolutionary court.<sup>55</sup> Ambassador Bremer formally eliminated these courts on 23 May 2002, although, in effect, they no longer functioned because of the war.<sup>56</sup> The public elimination of these courts communicated the Coalition’s serious commitment to improving the justice system and protecting human rights to the Iraqi people.

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<sup>54</sup> Coalition Provisional Authority, “CPA Justice Presence” Memorandum, Clint Williamson (16 June 2003), 6.

<sup>55</sup> Working Group on Transitional Justice in Iraq, 21.

<sup>56</sup> Coalition Provisional Authority, Ambassador L. Paul Bremer III. “Coalition Provisional Authority Order Number 2: Dissolution of Entities” (23 May 2003) <<http://www.cpa-iraq.org/regulations/CPAORD2.pdf>> (29 September 2003).

## **Summary**

An independent justice system is a critical element of the rule of law. The Coalition Provisional Authority arguably achieved its greatest success in restoring the Iraqi justice system under occupation. The Coalition forces in Iraq moved rapidly to restore the infrastructure required for a functioning court system, eliminated the most abusive of Saddam Hussein's courts, and consolidated the Ministry of Justice's control over the nation's judges and prosecutors. The Iraqi justice system, a year after Saddam Hussein's regime collapsed, handles the daily requirements of dispensing justice under the provisions of a streamlined, reformed legal code.

The temporary legal reforms that the Coalition Provisional Authority implemented during the occupation provided protections against unfair political prosecutions and discrimination. However, the Coalition Provisional Authority's modifications to Iraqi legal codes are temporary. Following the 30 June 2004 transfer of sovereignty and elections, the Iraqis will have the power to reverse these measures. The challenge for the Coalition is to continue to assist Iraq in its reformation efforts after it regains full sovereignty. Iraqis desensitized by Saddam Hussein's brutal, repressive rule are not inclined to moderate laws. The prevailing sentiment among Iraqi groups repressed by Saddam Hussein and the Ba'ath Party favors harsh punishment for members of the former regime.

## **DEALING WITH IRAQ'S PAST**

Saddam Hussein and the Ba'ath Party committed innumerable acts of torture, murder, and genocide against the Iraqi people. Dealing with these crimes and other human rights abuses will likely form the focus of the restored Iraqi justice system for years to come. Transitional justice experts have advocated a wide range of mechanisms for addressing Iraq's past abuses. While court trials will be a critical part of the process, the Coalition or the new Iraqi government could also employ other transitional justice mechanisms such as "truth commissions." The

Working Group on Transitional Justice examined a wide range of transitional justice approaches in its planning.

The Working Group on Transitional Justice proposed flexible transitional justice measures that included purges, truth commissions, trials, amnesties, and victim's compensation. The Working Group's recommendations reflect the understanding that the number of cases of abuse would overwhelm the courts. The situation in Iraq demanded non-judicial methods to dispense justice quickly and allow the country to move on and rebuild.

The Coalition Provisional Authority and the Iraqi Governing Council have established various commissions to gather evidence and interview witnesses and victims. Teams of U.S. prosecutors are working on the cases against Saddam in his inner circle. However, no cases of international war crimes, genocide, or crimes against humanity have come to trial, and the authorities have yet to implement any other means to dispense justice for past abuses. Many have called for faster action against the accused. On one hand, the Coalition Provisional Authority and the Iraqi Governing Council have exercised remarkable constraint, not rushing to mete "victor's justice." Trials, when they occur, will have a greater likelihood to be fair, impartial, and acceptable to all sectors of Iraqi society. However, the longer they wait to deliver justice to the Iraqi people, the more disillusionment and resistance will increase. Incidents of revenge and vigilantism will potentially rise as victims of the past regime begin to question whether their oppressors will face justice. The authorities must recognize they cannot delay justice indefinitely.

## **Truth Commissions**

While it was undesirable to rush court prosecutions of high-level regime officials, the Coalition Provisional Authority could have implemented the Working Group's recommendations to establish truth commissions throughout Iraq. To prosecute all of those accused of criminal acts

at the direction of the former regime would be impractical. Such cases number in the thousands and would overwhelm court capacity. The truth commission is an alternative to court trials for documenting human rights abuses and fostering reconciliation. Truth commissions are an historical function of transitional justice; they serve to establish official records and to facilitate reparations to victims. Historical justice is concerned with uncovering and exposing the “truth” about the past regime’s abuses, although it includes some crossover to criminal justice.

The commonly held underlying principle of the historical aspect of transitional justice is that in order to properly lay the foundation of a new political order, a society must first expose the truth about the past.<sup>57</sup> However, Teitel claims that the primary function of historical justice is not to form a foundation for the future, but to aid society in making the transition. She argues that the accounts established by truth commissions and the like are generally vignettes, not encompassing historical accounts of the nature of the past regime.<sup>58</sup> They serve to make society aware that of the nature and extent of the former regime’s crimes, but not to give a full accounting of those crimes.

In this sense, historical justice helps to create a normative consensus of ideas about the authoritarian past and a collective vision for a liberal future. Historical justice recognizes that individual responsibility for abuses under the authoritarian regime tends to blend with the culpability of the state and of society, and therefore avoids criminal prosecution of all but the most egregious and definitive cases. This approach preserves the political impact of the criminal prosecution of highly visible cases while quietly dealing with the vast majority of lesser offenses through non-judicial methods.

The Working Group on Transitional Justice proposed truth committees as a mechanism to deal with minor offenses and reduce the burden on the courts. The truth committees are similar to the truth commissions established as part of the transitional justice effort in South Africa

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<sup>57</sup> Teitel, *Transitional Justice*, 69.

<sup>58</sup> *Ibid.*, 115.

following the end of apartheid. The need for the committees is based on the view that the perpetrators of crimes against the Iraqi people may simply be too numerous to realistically anticipate dealing with them all by trial in a court of law, and that some of these abuses will be of a misdemeanor nature.

Truth committees, while central to dealing with the enormity of abuses, have a limited purpose to conduct fact-finding hearings in order to document abuses that do not rise to the standard of major crimes.<sup>59</sup> The Working Group on Transitional Justice envisioned Committees of Amnesty and Reconciliation to perform five primary functions:

Investigate claims formally and publicly reveal the truth about past human rights violations and the individuals involved.

Contribute to justice by imposing sentences other than deprivation of liberty, including amnesty for crimes covered by such a move, compensation for damages. In the event the case involves crimes beyond its jurisdiction or there is a breach of amnesty conditions, it shall refer the case to the criminal investigation committees, which in turn may send the accused to a court of competent jurisdiction.

Induce confessions of responsibility and guilt. Reconciliation and amnesty is thus not tantamount to acquittal.

Involve and satisfy the concerns of victims, achieve reconciliation and renounce vengeance, vendettas and violence.

Link amnesty to the work of truth committees in bringing about reconciliation. Amnesty shall not extend to those who do not confess responsibility for abuses and publicly apologize for their misdeeds. This is similar to what occurred in South Africa.<sup>60</sup>

Amnesty is a central theme for the truth committees, and is the primary incentive for defendants to agree to the terms of the committee rather than face a court trial. In order to qualify, the defendant must admit guilt, identify any others who participated in the crime, and agree to pay the compensation set by the committee. The committees must refer cases for prosecution if the defendant fails to meet any of these requirements, or if evidence points to a crime that exceeds the standard of a misdemeanor. The committees would have the power to dispose of cases by

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<sup>59</sup> Working Group on Transitional Justice in Iraq, 7.

<sup>60</sup> Ibid.



granting amnesty, imposing compensation, ordering community service, or to dismiss cases for lack of evidence.<sup>61</sup>

The interim constitution signed on 8 March 2004 did not include provisions for establishing truth commissions. Nor has the Coalition Provisional Authority established international mechanisms to provide a truth commission function. Absent historical justice mechanisms, criminal prosecution is the only method for dealing with regime abuses in the near future. Essentially, the Coalition Provisional Authority's failure to establish truth commission leaves a tremendous burden of unresolved cases for the new Iraqi government to handle. If the Iraqi Governing Council and its successor interim government rely solely on criminal prosecution, the caseload will overwhelm Iraq's courts.

## **Special Tribunals**

Prosecuting former regime leaders for crimes and human rights abuses against the Iraqi people is an important part of the transitional justice process and falls within the criminal justice dimension. Criminal justice in transitions deals primarily with the prosecution of individuals. Transitional criminal justice takes the Nuremberg Trials as its point of departure. At Nuremberg, the occupying power set out to determine individual responsibility for the aggressions and crimes of the war, rather than assign guilt (and punishment) to the nation as a whole.<sup>62</sup>

Since Nuremberg, transitional criminal justice has taken many forms, but the overall objective remains the same. Prosecuting those who commit crimes against their own people helps the nation deal with its past. The nature and jurisdictions of the courts for trying the accused are under heavy debate, both inside Iraq and in the International community. Several options for establishing these courts exist, varying in the degree of Iraqi involvement and control over the

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<sup>61</sup> Ibid., 35-37.

<sup>62</sup> Teitel, *Transitional Justice*, 31.

process. It is certain, however, that authorities will need to employ other means of dealing with the regime's abuses.

Most writers concur that the best way to prosecute members of the former Iraqi regime for war crimes and crimes against humanity is through some sort of special tribunal. However, agreement ends on that point. Ideally, the courts would prosecute all former regime officials suspected of criminal activity. In practice, however, only a fraction of those implicated actually face prosecution. Societies newly emerged from repressive rule, weary of violence, often lack the will to prosecute every alleged crime of the past regime. The reasons for this reluctance vary widely. In some cases, the number of people subject to prosecution is so large as to comprise an indictment of the society as a whole. For the most part, widespread prosecution is simply too costly, and the nation's resources are better spent on building for the future.

Regardless of the reasons, the reality is that criminal justice in transitions normally involves the prosecution of a few high profile cases. The U.S. Administration considered early on in the planning process using U.S. military tribunals to prosecute Saddam Hussein and his inner circle.<sup>63</sup> Strong opposition from international organizations and the Iraqi Jurists Association caused Defense planners to seek other solutions.

The Working Group on Transitional Justice described options for special tribunals. The first option is forming an ad hoc international tribunal. That court would consist of international jurists with experience in international criminal trials stemming from the conflicts in the Balkans, Sierra Leone, East Timor, and others. The second option is establishing a hybrid tribunal with international and Iraqi judges serving side by side. Finally, Iraqis could manage the entire process within special national courts staffed by Iraqi judges.<sup>64</sup> Inevitably, the various international

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<sup>63</sup> Martin Bright, "Splits Widen on the Road to Justice," *Observer* (20 April 2003) <<http://www.globalpolicy.org/security/issues/iraq/attack/law/2003/0420split.htm>> (3 February 2004).

<sup>64</sup> Working Group on Transitional Justice in Iraq, 10-11.

agencies, U.S. government departments, and the Iraqis each had their preference for the type of tribunal in Iraq. Each option had advantages and disadvantages for prosecuting regime crimes, and each faction worked to establish that form which best met their interests.

Most advocates of establishing an ad hoc international tribunal built their argument on issues of legitimacy and fairness. An international tribunal established under Chapter VII of the United Nations Charter could bridge disagreements between the U.S.-led Coalition and its detractors in the international community. Professor Teitel wrote, “Only the United Nations can meet the demand for transitional justice in Iraq. This requires the immediate establishment of a judicial body, whose legitimacy would be based on the same multilateral process that was sought before the war.”<sup>65</sup> Richard Dicker of Human Rights Watch contended that such an ad hoc tribunal would be “impartial, fair and independent.”<sup>66</sup> Such attitudes reflect concerns over Iraq’s ability to conduct post-Saddam prosecutions of former regime criminals.

The concepts of legitimacy and fairness embodied in these arguments have little to do with the same concepts in Iraq. While U.N. involvement ostensibly lends legitimacy to trials of former regime members, the Iraqi Jurists Association opposed U.N. control over prosecutions because of perceptions that the U.N. failed to intervene early enough. Sermid al-Sarraf is an Iraqi-American lawyer who participated in the Working Group for Transitional Justice in Iraq. He summarized the Iraqi view, that “most Iraqis would have liked to see an international tribunal ten years ago, but not since the international community has not taken up its responsibility.”<sup>67</sup>

Other international organizations also criticized the ad hoc international tribunal approach. Amnesty International supported a U.N. commission to assist in rebuilding the Iraqi

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<sup>65</sup> Ruti Teitel, “Made-to-measure justice” (25 July 2003) *Globe and Mail* <[http://www.globalsecurity.com/iraq/made\\_to.htm](http://www.globalsecurity.com/iraq/made_to.htm)> (18 March 2004).

<sup>66</sup> Richard Dicker, “Letter to US Regarding the Creation of a Criminal Tribunal for Iraq” (15 April 2003) <<http://www.hrw.org/press/2003/04/iraqtribunal041503ltr.htm>> (28 March 2004).

<sup>67</sup> Thomas J. Rose, “Planned Iraqi Tribunal Sparks Controversy” *The Washington Times* (7 December 2003) <<http://www.washtimes.com/upi-breaking/20031207-021821-9845r.htm>> (2 April 2004).

justice system, but expressed concern that U.N. politics could restrict the court's jurisdiction and function.<sup>68</sup> Similar issues surface for the option of employing a hybrid tribunal consisting of international and Iraqi jurists.

The hybrid tribunal is a relatively new mechanism for prosecuting war crimes and crimes against humanity. Initially employed in Sierra Leone and East Timor, hybrid tribunals combine international expertise with Iraqi capabilities and have broad support in the international community. Paul van Zyl of the International Center for Transitional Justice (ICTJ) favored establishing a hybrid tribunal under Chapter VII of the U.N. Charter, which would negate potential challenges to the court's jurisdiction and procedures based on Iraqi domestic law.<sup>69</sup> However, many Iraqis opposed this approach because it would restrict their ability to impose capital punishment.

The option most favored by the Iraqi governing council was establishing a special national court to handle the most serious crimes under international law and dealing with lesser crimes through the existing court system under Iraqi law. This option would allow Iraq to control the level of international involvement on the court and give Iraq the ability to apply the death penalty if the interim government reinstated capital punishment. Because of this, many in the international community oppose Iraqi control over the tribunal process.

The issue of international judges on the tribunal became a particular point of contention for the Iraqis. Judge Dara Noor Alzin of the Iraqi Governing Council said, "These crimes were committed by Iraqis against Iraqis in Iraq, so we prefer Iraqi judges in Iraqi courts."<sup>70</sup>

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<sup>68</sup> Amnesty International, "Iraq: Ensuring justice for human rights abuses" (11 April 2003) <<http://web.amnesty.org/library/print/ENGMDE140802003>> (28 March 2004).

<sup>69</sup> Paul van Zyl, "Transitional Justice in Iraq: An ICTJ Policy Paper" (May 2003) <<http://www.ictj.org/downloads/Iraq%20Transitional%20Justice%20Policy%20Paper.pdf>> (28 March 2003).

<sup>70</sup> Deborah Pasmantier, "Iraq to set up tribunal to punish war crimes," *Agence France-Presse* (30 October 2003) <[http://quickstart.clari.net/qs\\_se/webnews/wed/dg/Qiraq-justice-tribunal.RFLL\\_DOU.html](http://quickstart.clari.net/qs_se/webnews/wed/dg/Qiraq-justice-tribunal.RFLL_DOU.html)> (4 February 2004).

Ambassador Bremer's delegation of authority effectively defused such opposition. However, the Coalition Provisional Authority order did include a provision to allow non-Iraqi judges to sit on the Iraqi Special Tribunal.<sup>71</sup> However, if Iraq insists on reinstating the death penalty it will exclude judges from many countries. The death penalty is divisive in the discussion of trials for regime officials accused of genocide and war crimes. Amnesty International included a death penalty prohibition as one of its "fundamental principles for ensuring justice" in Iraq.<sup>72</sup>

The Working Group on Transitional Justice in Iraq recognized the dilemma of the death penalty if international courts became involved in post-conflict trials. The maximum penalty that an ad hoc or hybrid tribunal can impose under international law is life imprisonment. Since Iraqi courts could impose the death penalty, use of an international court could create a situation in which ordinary murderers would receive the death penalty in Iraqi courts while regime leaders convicted of the more serious crimes, like genocide, would receive life imprisonment.<sup>73</sup>

The Working Group did propose solutions to the dilemma. The first was to allow the Iraqi Special Tribunal to impose the death penalty for major international crimes. The second was to abolish the death penalty in Iraq entirely.<sup>74</sup> The Coalition Provisional Authority solved the problem for the interim period by suspending the death penalty. However, following the transfer of authority set to occur on 30 June 2004, the Iraqi interim government will have the authority to reinstate capital punishment.

The decision to hand the tribunal process back to the Iraqi Governing Council reflected the political realities of the situation. With the transfer of sovereignty set to occur at the end of

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<sup>71</sup> Coalition Provisional Authority. "Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Special Tribunal" 9 December 2003, <<http://www.cpa-iraq.org/regulations/CPAORD48.pdf>> (27 January 2004).

<sup>72</sup> Amnesty International, "Iraq: Ensuring justice for human rights abuses" (11 April 2003) <<http://web.amnesty.org/library/print/ENGMDE140802003>> (28 March 2004).

<sup>73</sup> Working Group on Transitional Justice in Iraq, 11-12.

<sup>74</sup> Ibid.

June 2004, the Coalition Provisional Authority would cease to exist during the trials, causing severe jurisdictional problems. Additionally, the issue of Iraqi control was becoming an obstacle to completing a transitional constitution under development by the Iraqi Governing Council and the Coalition Provisional Authority.

## **Summary**

The Coalition Provisional Authority has not implemented comprehensive programs to handle the thousands of Iraqis suspected or accused of crimes and abuses under Saddam Hussein. The Coalition Provisional Authority has helped Iraq design a tribunal to prosecute Saddam Hussein and the worst offenders of his regime. However, it failed to implement historical justice mechanisms such as truth commissions to deal with the thousands of lesser offenders. Such measures would have constituted a relatively low-cost solution to demands for justice from the regime's victims. The prospect of amnesty could have reduced the intensity of the insurgency that followed. The measures taken by the Coalition Provisional Authority demonstrate an unwillingness to deal directly with the issues of criminal and historical justice in Iraq.

The Coalition Provisional Authority has taken every opportunity to put transitional justice responsibilities in the hands of the nascent Iraqi government. This tendency to pass responsibility to the Iraqi Governing Council stems from the Coalition Provisional Authority's limited mandate and the difficult security situation. Political necessity led Coalition planners to sacrifice broad international support in favor of supporting the desires of the Iraqi Governing Council. The potential still exists for international involvement. It will occur only if Iraq requests assistance from the international community and agrees to its conditions.

Despite its shortcomings, the Coalition Provisional Authority has reasonably succeeded in shaping the institutions and legal environment in Iraq to deal with transitional criminal justice for the long term. The Iraqi Special Tribunal, once it begins work, has the potential to be a model

for future interventions. By limiting the court's jurisdiction to international crimes and specific crimes under Iraqi law, the Coalition Provisional Authority and the Iraqi Governing Council avoid the pitfalls of *ex post facto* justice. Iraqi control of the court leaves open the issue of capital punishment, allowing Iraq to maintain judicial fairness. If the Iraqis reinstate the death penalty following the transfer of authority in June 2003, they will be able to apply equitable sentencing in their national courts and the Special Tribunal.

## **CONCLUSIONS**

### **Challenges of Justice in Occupation**

When the U.S.-led Coalition invaded Iraq and toppled Saddam Hussein's Ba'ath Party regime, the U.S. military and its Coalition partners became an occupying force under the Hague Regulations. The United States Army, in particular, has a history of avoiding the subject of military occupation over a hostile nation. The Army has not trained its soldiers nor established doctrine for its role as an occupation force. Military government, even under nominal civilian control, has never been a particularly efficient or effective endeavor. Coalition forces faced enormous challenges in the first year of the occupation. Their mission was all the more difficult because they essentially worked it out as they went along.

The long-term stability of Iraq depends on the rule of law. Saddam Hussein ruled Iraq by fiat. The Ba'ath Party faithful enjoyed considerable privilege and immunity at the expense of their countrymen. Saddam Hussein and the Revolutionary Command Council manipulated the law and the courts to their own benefit. Under Ba'ath Party rule, fear substituted for respect, whim for principle. The new Iraq requires an independent judiciary that adheres to principles of law and does not discriminate against minority groups.

Under the rules of occupation, the Coalition Provisional Authority bore full responsibility for Iraqi justice during the transition from totalitarianism to democracy. The Coalition Provisional

Authority and its predecessor, the Office of Reconstruction and Humanitarian Assistance, did not go to Baghdad with a preconceived, comprehensive plan for managing Iraq's justice system. For the most part, Coalition planners approached the post-conflict environment with a variety of potential transitional justice initiatives that they could apply to a wide range of scenarios.

The Coalition Provisional Authority's approach to planning for transitional justice in Iraq demonstrated the complexities and political realities of the situation. Coalition planners recognized that solutions imposed without Iraqi involvement and leadership would last only as long as the Coalition Provisional Authority remained in control of the country. Instead of attempting to achieve a perfect solution, planners focused on establishing acceptable judicial capacity for the period of occupation and setting the conditions for Iraqis to effect lasting change over the long term.

## **Regime Change**

Many have criticized the Coalition Provisional Authority for oversimplifying the challenges of administering Iraq under occupation. The critics are partly correct. Administration officials sought to model the occupation after Allied experience in post-World War II Germany. Yet, the Coalition Provisional Authority adopted the least successful policy from that example. Like de-Nazification in post-war Germany, the de-Ba'athification policy in Iraq led to shortages of qualified bureaucrats and widespread resentment. Removing Saddam Hussein's regime of one-party rule to make way for a democratically elected government was the Coalition Provisional Authority's primary goal.

Ambassador Bremer's first official action was the de-Ba'athification order that targeted the top three levels of the Ba'ath Party.<sup>75</sup> De-Ba'athification became the most divisive issue of the

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<sup>75</sup> Coalition Provisional Authority, "Coalition Provisional Authority Order Number 1: De-Baathification of Iraqi Society" (16 May 2003) < <http://www.cpa-iraq.org/regulations/CPAORD1.pdf> > (29 September 2003).



occupation. For many Iraqis repressed by Saddam Hussein's regime, nothing less than the removal of every Ba'ath Party member satisfied their desire to punish Saddam's supporters. However, arbitrary application of the policy inflamed the resistance of the newly disenfranchised Sunni minority. De-Ba'athification achieved its primary aim of eliminating the Ba'ath Party's control over Iraqi society almost immediately. Although some have argued that the Coalition should have taken a more selective approach to purging Ba'ath Party members, the exigencies of the immediate post-conflict environment dictated otherwise. The Coalition Provisional Authority depended upon the cooperation of the Iraqi opposition and the Iraqi people to establish a new representative government. That cooperation depended on eliminating the Ba'ath Party threat. Political considerations greatly influenced how the Coalition Provisional Authority implemented justice initiatives in Iraq after the war. Rather than making changes unilaterally, the Coalition Provisional Authority sought agreement or compromise with the Iraqi Governing Council on most issues.

Overall, de-Ba'athification had mixed results. Ideally, planners would be able to balance purging members of the abusive regime with retaining qualified government administrators. Lacking such insights, they adopted administrative justice measures that quickly achieved the higher strategic objective. This approach ensured that high-level Ba'athists that supported Saddam's abuses could not control the direction of the transitional government, yet provided a mechanism for reinstating party members on the Coalition Provisional Authority's terms.

Perhaps the most successful implementation of de-Ba'athification occurred within the Ministry of Justice. Practical considerations drove the Coalition to keep most judges and prosecutors on the job. In some cases, public outcry prompted Coalition commanders to remove judges accused of supporting Saddam's brutal repressions. However, most Iraqi judges returned to their courtrooms within weeks after the regime collapsed. The Ministry of Justice's Judicial Review Committee vetted every judge and prosecutor in Iraq and, in the end, removed relatively

few. This balanced approach ensured that Iraq kept a functional judiciary after de-Ba'athification.

The results of de-Ba'athification in Iraq add to the body of knowledge on the effects of purges in times of political transition. As implemented in most sectors of government, de-Ba'athification resulted in shortages of trained personnel in Iraqi government institutions, most notoriously in the education system. However, it also succeeded in lifting the repressive control that Iraqis suffered under for generations. When balanced with the need to retain qualified personnel, the Coalition Provisional Authority and the Iraqi interim government were able to eliminate the worst offenders without disabling essential government functions. The unintended consequence of de-Ba'athification was the extreme resentment generated among the disenfranchised Sunni population and extensive delays in processing appeals.

As a recommendation for future occupations, defense planners need to consider carefully the effectiveness of administrative justice mechanisms such as purging and vetting. Occupation commanders should adopt a pragmatic approach that balances the political requirements of regime change against the practical requirements of running a country. As seen in Iraq, a simplistic formula that targets the top levels of bureaucracy can have unintended consequences and lead to long-term problems. The individualized approach employed by the Iraqi Ministry of Justice was far more effective in sustaining capability and capacity. The political requirements of the de-Ba'athification policy were met in a deliberate manner without the debilitating outcomes experienced in other government agencies.

## **Capacity and Capability**

Eliminating Ba'ath loyalists from Iraqi courts met the Coalition's political objectives. However, the Coalition Provisional Authority also dealt with extensive practical considerations. Following the war, the Coalition responded rapidly to restore the Iraqi justice system's infrastructure and to promote legal and institutional reforms. The Coalition succeeded in

reopening nearly all of Iraq's courts within six months, a remarkable accomplishment in a difficult security environment. However, the planning for occupation in Iraq occurred separately from the planning for combat operations. Some of the damage to the infrastructure could have been prevented by identifying the key infrastructure earlier in the planning process. Coalition forces lacked tactical missions to protect key infrastructure, including Ministry of Justice facilities, in the wake of combat operations. The goal should be to identify infrastructure critical to justice operations during occupation and to assign appropriate forces to protect it.

The Coalition Provisional Authority implemented a limited number of changes to Iraq's legal codes. Most of the changes were temporary, stopgap measures to frame Iraq's legal environment until an elected government could take up the larger constitutional issues facing the country. Coalition justice planners did not attempt a complete transformation of Iraq's laws in the interim. Rather, they rolled back the clock to 1969, before Saddam Hussein came to power. Like Iraqi jurists inside Iraq and in exile, Coalition planners recognized that the legal codes and court structure of pre-Saddam Iraq were sufficient for Iraq during occupation and transition.

The changes imposed by the Coalition Provisional Authority mostly pertained to laws defining political crimes in the Iraqi penal code. An entire category that the Coalition Provisional Authority eliminated was a series of provisions aimed at punishing former and current Ba'ath Party members suspected of working with other political organizations. Through these provisions, Saddam Hussein maintained tight control over the Ba'ath Party structure. The punishments for such political crimes were exceptionally harsh under Saddam Hussein. The punishment for most political crimes under Saddam Hussein carried the death penalty.<sup>76</sup>

Ambassador Bremer suspended capital punishment in Iraq for the duration of occupation. Capital punishment was a particularly divisive issue for the Coalition and Iraqis. The European members of the Coalition, in particular, had legal barriers making it impossible for them to hand

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<sup>76</sup> Iraqi Penal Code of 1969 <<http://www.casi.org.uk/info/cpa/penalcode.doc>> (23 February 2004).

over Iraqi prisoners to a court empowered to impose death sentences. The Coalition's temporary suspension of capital punishment enabled the Coalition partners to work together with the Iraqi court system. Future planners will face similar challenges in Coalition operations and must account for the legal conditions that enable Coalition partners to participate in U.S.-led operations.

As a recommendation for further study, operational planners within combatant commands could begin the analysis of potential adversaries' legal systems now. The framework for such analysis exists in the Operational Net Assessment model under development at United States Joint Forces Command. The Operational Net Assessment incorporates interagency analysis to determine potential U.S. responses in contingency operations. Balancing the legal analysis from the Operational Net Assessment against known constraints of potential Coalition partners will produce an appropriate framework for modifying the adversary's legal system and codes under occupation.

## **Accountability and Punishment**

Although the Coalition Provisional Authority assumed direct authority for modifying Iraq's legal codes, it did not assert its legal authority to prosecute war crimes in Iraq. The Coalition Provisional Authority delegated responsibility to the Iraqi Governing Council for prosecuting Saddam Hussein and others accused of international crimes against humanity, genocide, and war crimes. The Iraqi Governing Council in turn established the Iraqi Special Tribunal to hear cases involving crimes under international law. The Coalition Provisional Authority compromised and conceded to Iraqi demands that Saddam Hussein and his inner circle should face charges in Iraqi courts with Iraqi judges presiding.

Critics of the Coalition effort in Iraq contended that the Coalition Provisional Authority and the Iraqi Governing Council risked a perception of victor's justice. Many in the international

community opposed giving Iraqis control over prosecuting former regime authorities, and argued for an ad hoc international or hybrid tribunal. Most critics of an Iraqi-led tribunal to handle criminal prosecutions in transition focus on legitimacy as the central issue. However, these critics take an international perspective to legitimacy. While the legitimacy of the Iraqi government in the international community is an important issue, the overriding factor is its legitimacy within Iraq.

The primary concern over Iraqi control of criminal prosecutions was their relative inexperience in handling complex cases under international law. Although the statute that established the Iraqi Special Tribunal dictated that the tribunal would bring in international jurists to advise and assist in the trials of regime officials, only Iraqi judges will hear cases and render judgments. Iraqi control over criminal justice proceedings will legitimate the new Iraqi government for the majority of Iraqis. Whether the results of criminal trials meet international standards of legal proceedings is less important than creating the public view that Iraq is sovereign, independent, and capable of managing its own affairs.

Having left criminal prosecutions to the Iraqi Governing Council, the Coalition Provisional Authority should have promoted alternatives to deal with the thousands suspected of relatively minor abuses. The prospect of amnesty could have prevented many former regime loyalists from joining the insurgency. Those facing prosecution had few options for peaceful resolution. Given the choice between punishment and resistance, it is not surprising that they continued to fight. In future wars that transition to occupation, planners should balance the need for criminal prosecution against non-punitive justice measures.

The Coalition Provisional Authority was a temporary entity designed to bridge the gap between Saddam Hussein's regime and a legitimate, elected Iraqi government. It was neither desirable nor appropriate to expect the Coalition Provisional Authority to impose permanent solutions on Iraq. At some point, Iraqis will have sole responsibility for governing themselves.

This political reality is evident in the Coalition Provisional Authority's actions and methods. The Coalition Provisional Authority took every available opportunity to pass transitional justice responsibilities to Iraqis. In the end, no one else could get the job done. Permanent changes to Iraq's justice system await an elected Iraqi body that will establish a new legal environment in Iraq through the constitutional process. Although transitional justice measures during the occupation are important precursors, they do not necessarily define future norms.

## **Recommendations for Planners**

In the past, planners have avoided dealing with issues related to the rule of law until forced to it by the realities of occupation. While the post-combat political environment is uncertain, planners can anticipate commonalities found in past transitions. The following recommendations reflect the most common requirements for justice systems in transition:

*Balance Purges with Selective Vetting.* Sweeping purges quickly eliminate authoritarian structures, but disenfranchise large groups and strengthen resistance and insurgency. Selective vetting preserves governmental expertise and capacity. While it is effective for removing the worst abusers, it takes significantly more time to implement. Purge the smallest group practical, and establish an effective appeals process.

*Plan to Protect and Secure Courts.* When repressive regimes are removed by force, looting and vandalism usually follows. The resulting damage delays restoration of basic government services that are vital to the interests of the occupying power and the successor regime. Military planners should not assume that follow on forces or civilian agencies will bear the responsibility immediately following decisive combat operations. Limiting the amount of damage is less costly than repairing and reconstructing key facilities.

*Identify Potential Legal and Organizational Changes.* The Operational Net Assessment provides a mechanism for evaluating an adversary's legal system well before hostilities

commence. Planners can use the Operational Net Assessment to identify specific laws and institutions to modify during occupation, subject to the requirements of the Hague Regulations and the Geneva Conventions. Legal and organizational changes should achieve two functions: protect the rights and freedoms of the occupied people, and enable effective implementation of occupation policy.

*Consider Alternatives to Criminal Prosecution.* Alternatives to criminal prosecutions, such as truth commissions and amnesties, are “combat multipliers.” Using these mechanisms reduces the burden on the occupied country’s court system. It also allows occupation authorities and successor regimes to quickly dispense of lower level abuses and focus resources and attention on high profile cases. By implementing such measures quickly, occupation authorities demonstrate positive action toward dispensing justice.

Justice in transitions ties inextricably to political conditions. Transitional justice measures will always be second-guessed in political terms by the media, academia, and politicians. Consensus is the least likely result of a public discourse on the appropriate way to handle justice under occupation. Planners must seek the pragmatic solution, recognizing that political exigencies will shape the final decisions. Stability is the main objective for all occupation policies. Transitional justice measures offer a wide range of solutions to a fairly narrow problem set. Occupation authorities succeed by retaining flexible options and not hesitating to change course if the current plan is failing.

## **APPENDIX A – Hague Regulation 1907 Selected Articles**

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.  
Private property cannot be confiscated.

Article 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Article 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.



## **APPENDIX B – Geneva Conventions (IV) 1949 Selected Articles**

Article 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Article 13. Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 54. The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Article 58. The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

Article 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Article 65. The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Article 66. In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

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